

THE HONORABLE MARSHA J. PECHMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

REC SOFTWARE USA, INC., a Virginia
corporation

Plaintiff,

v.

HTC AMERICA, INC., a Washington
corporation

Defendant.

Case No. 14-cv-01025-MJP

JOINT PROPOSED TRIAL SCHEDULE

Pursuant to the Court's October 14, 2014 Minute Entry [ECF No. 21], the parties have conferred regarding a proposed case trial schedule, but were unable to reach full agreement. The parties' competing proposed trial schedules, and their positions on the same, are set out below.

A. Proposed Schedules

<u>Event</u>	<u>REC's Proposed Date</u>	<u>Defendants' Proposed Date</u>
Non-Infringement Contentions	December 16, 2014	January 2, 2015
Invalidity Contentions	December 16, 2014	January 2, 2015
Deadline for Amending the Pleadings	January 9, 2015	January 9, 2015
Status Conference	January 26, 2015	January 26, 2015
Exchange of Proposed Claim Terms	December 16, 2014	January 22, 2015
Exchange of Preliminary Claim Constructions and Extrinsic Evidence	December 23, 2014 (if necessary)	February 23, 2015
Joint Claim Construction and Pre-Hearing Statement	January 12, 2015 (if necessary)	April 9, 2015

<u>Event</u>	<u>REC's Proposed Date</u>	<u>Defendants' Proposed Date</u>
Claim Construction Expert Disclosures	January 12, 2015 (if necessary)	April 9, 2015
Completion of Claim Construction Discovery	February 12, 2015	May 29, 2015
Status Conference	April 26, 2015	April 26, 2015
Opening Claim Construction Briefs	January 26, 2015 (if necessary)	June 3, 2015
Responsive Claim Construction Briefs	February 9, 2015 (if necessary)	June 18, 2015
Status Conference	July 27, 2015	July 27, 2015
Claim Construction Hearing	March 3, 2015 (if necessary)	August 2015 (or at the Court's convenience)
Exchange Opening Expert Witness Disclosure/Reports Under FRCP 26(a)(2)	April 3, 2015	30 days after Claim Construction Ruling
Exchange Rebuttal Expert Reports	May 4, 2015	30 days after Exchange of Opening Expert Reports
Status Conference	N/A	October 26, 2015
Complete Discovery	June 12, 2015	November 14, 2015
Deadline for Dispositive Motions	July 3, 2015	December 14, 2015
Deadline for Motions in Limine	August 31, 2015	January 11, 2016
Pretrial Order	September 28, 2015	January 25, 2016
Pretrial Conference	October 12, 2015	February 8, 2016
Proposed Voir Dire/Jury Instructions	October 26, 2015	February 29, 2016
Jury trial (5 days)	November 2, 2015	March 14, 2016 (or at the Court's convenience)

1 **B. REC's Position**

2 The parties disagree regarding (i) the dates for defendants' invalidity and non-
3 infringement contentions, (ii) the amount of time to be expended on claim construction, and (iii)
4 the trial date. The practical effect of the parties' disagreement is a four-month overall difference
5 between the schedule proposed by plaintiff and the schedule proposed by defendants.

6 Plaintiff proposes a schedule that would see the claim construction process completed in
7 three months, and plaintiff proposes a November 2015 trial date, which is nearly 17 months after
8 these cases were filed. Defendants propose to prolong this case even further, offering a March
9 2016 trial date, which is 21 months after these cases were filed.

10 **1. Invalidity Contentions**

11 Local Patent Rule 121 makes invalidity contentions due not later than 30 days after
12 service of plaintiff's infringement contentions. Plaintiff served the infringement contentions on
13 November 7, 2014. Plaintiff proposes that the Court maintain the date, December 16, 2014, that
14 was previously negotiated by the parties and agreed to by defendants, as set forth in the parties'
15 Joint Proposal Regarding Common Discovery Timeline, filed on October 3, 2014. The
16 December 16 deadline represents a 7-day extension of the time period allowed by the rules.

17 These cases were filed in July 2014. By December 16, defendants will have had ample
18 time—nearly 5 months—to formulate their invalidity contentions. Easing defendants' burden
19 even further was the ready accessibility of the invalidity contentions asserted by Microsoft
20 against the same patent in the prior litigation—those contentions are in the public record (Docket
21 No. 400, Ex. 5). Despite the “head start” provided by the invalidity contentions asserted in the
22 *Microsoft* litigation involving the same patent, defendants propose to extend the deadline for
23 invalidity contentions 17 days beyond the date to which they had previously agreed and 24 days
24 beyond the deadline set forth in the Local Patent Rules. Plaintiff believes such a delay is not
25 warranted in these cases, which involve a single independent claim (and several claims
26

1 dependent on that independent claim) of a well-litigated patent and sophisticated and
2 experienced counsel and parties.

3 **2. Non-Infringement Contentions**

4 Plaintiff proposes to also extend the time for defendants' non-infringement contentions to
5 December 16, 2014, or 7 days beyond the time allowed by LPR 121. This is also 7 days more
6 than the date the parties previously agreed to, December 9, 2014. Setting a common deadline for
7 both the non-infringement contentions and invalidity contentions is also consistent with the
8 Local Patent Rules, which incorporate a common deadline.

9 As noted above, these cases involve a single independent claim (and several claims
10 dependent on that independent claim) of a well-litigated patent. By December 16, 2014,
11 defendants and their sophisticated and experienced counsel will have had ample time to
12 formulate their non-infringement contentions, particularly in light of the detailed infringement
13 contentions provided by plaintiff.

14 Defendants contend that they have been hindered by the manner of service of the
15 infringement contentions. Defendants do not contend that plaintiff failed to properly serve its
16 contentions, and, in any event, plaintiff's proposed schedule allows defendants an additional
17 week. Plaintiff complied with the procedural rules for service of its contentions. Plaintiffs
18 provided detailed contentions supplemented by appendices including a substantial amount of
19 material (mostly source code) as requested by defendants. The volume of data required plaintiff
20 to produce its infringement contentions (including appended materials) on a USB "thumb" drive
21 served by U.S. mail in accordance with Fed. R. Civ. P. 5(b). The mailings were addressed to
22 defendants' Seattle counsel, and an email detailing the mailing, including the identities of the
23 addressees and instructions to access the documents on the thumb drives, was delivered to all
24 counsel for each defendant. No defendant had requested service by any other means. The
25 packages were placed in the mail on Friday, November 7, and arrived at the offices of
26 defendants' Seattle attorneys the next business day, Monday, November 10. Some defendants'

1 counsel acknowledged receipt on November 10. Other defendants' counsel initially expressed
2 difficulty locating the package in their offices, or in the offices of their Seattle colleagues. Any
3 such difficulties do not justify an extension of the deadline.

4 Neither do defendants' complaints regarding the detail and volume of materials served
5 with plaintiff's infringement contentions justify an extension of more than 7 days. Plaintiff
6 acknowledges that it served very detailed infringement contentions on defendants—detail that
7 defendants had demanded. By letter dated September 26, 2014, defendants demanded that
8 "REC's infringement contentions will not only identify each allegedly infringing product with
9 specificity, but also provide a detailed analysis of the publicly-available source code for each of
10 the products REC intends to accuse." Defendants should not be heard now to complain that they
11 received too much detail. As a courtesy to defendants, plaintiff appended a substantial volume
12 of material to its contentions—volume comprising mostly source code.

13 Detailed infringement contentions do not warrant an extension of the deadline. Indeed, if
14 anything, the detailed and specific nature of plaintiff's contentions should make defendants' task
15 of responding that much easier. Nonetheless, defendants propose to extend the deadline for non-
16 infringement contentions 24 days beyond the deadline set forth in the Local Patent Rules.
17 Plaintiff agrees to an extension of one week, but plaintiff believes that any further delay is not
18 warranted in this case. Defendants have substantial resources available to them, including
19 detailed knowledge of their own products, and have had months to evaluate plaintiff's patent.
20 Defendants should be held to a schedule incorporating a moderate extension of the deadlines
21 they previously negotiated and proffered to the Court.

22 **3. Claim Construction and Trial Date**

23 At the October 9, 2014, hearing, this Court identified Judge Robart's prior construction of
24 the patent-in-suit in the *Microsoft* litigation, including the sole independent claim asserted in this
25 case. It should not be necessary to interpret the claims a second time. In any event, any claim
26 construction process should be compact and limited. Plaintiff also understood the Court to

1 indicate that trial would be scheduled between 12-18 months after the cases were filed. Plaintiff
2 proposes a November 2015 trial date, or 17 months after filing. Defendants propose a March
3 2016 trial date, or 21 months after filing.

4 In summary, plaintiff's proposed schedule should be adopted.

5 **C. Defendants' Position**

6 During the status conference held on October 9, 2014 , the Court advised the parties that
7 it was currently setting trial dates one year to eighteen months out from the conference date.
8 REC proposes the shortest schedule within this range. This is inappropriate for a case that
9 involves ten defendants and in which REC's infringement contentions (which were just served)
10 include more than one million pages for each Defendant. Defendants' proposed schedule falls
11 towards the middle of the Court's current range of trial dates and thus aligns with the Court's
12 guidance as to timing. This is the primary issue presented. If a trial date within the period for
13 which the Court is currently scheduling trials is acceptable, the Court can and should adopt
14 Defendants' schedule.

15 Defendants' schedule does, however, adjust the dates for noninfringement and invalidity
16 contentions, because Defendants received REC's infringement contentions after the deadline and
17 because these contentions are quite voluminous. First, REC served its infringement contentions
18 by U.S. Mail, and refused to provide Defendants with email courtesy copies. As a result, many
19 Defendants did not receive their infringement contentions until five or six days after REC's
20 deadline. Second, REC's infringement contentions comprise more than 1.3 million records, and
21 include dozens of unique filetypes that are not readily processed by standard software tools (i.e.
22 they are not .pdfs or .tifs and are instead native files of uncommon filetypes). With several
23 Defendants having just received the contentions in the last two days, Defendants have not been
24 able to even open the majority of these documents, let alone begin to review and analyze the
25 contentions. Defendants thus request an additional three weeks to provide their noninfringement
26 and invalidity contentions. This is reasonable and tailored under the circumstances.

With respect to claim construction dates, Defendants' proposed dates adhere to the timeline of the Local Patent Rules, rather than the aggressive timeline that REC proposes. This is again reasonable given the number of defendants and the complexity of the case. Although a number of issues relating to the asserted claims were addressed in the *REC v. Microsoft* case, REC has asserted at least one claim against Defendants that was not at issue in that case. Further, REC's interpretation of the asserted claims set out in its infringement contentions indicates that there are claim construction issues relating to the asserted claims that were either not addressed in the *Microsoft* case or require further clarification. Defendants acknowledge that the parties should ensure the scope of the claim construction disputes are narrowed (e.g., by asking the Court to revisit only those aspects of the constructions that are absolutely necessary, given the facts of this case), but that does not mean that the process can necessarily be rapid. With so many Defendants, many of which are based in foreign countries, and such complex infringement allegations, a claim construction process that complies with the Local Patent Rules—not REC's accelerated timeline—is appropriate.

DATED this 14th day of November, 2014.

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